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No. 965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

LINUS C. PAULING, S. ADLER,
GUNTHER ANDERS, ET AL.,
Petitioners,

vs.

ROBERT S. McNAMARA,
Secretary of Defense of the United States,
GLENN T. SEABORG, Chairman,
JOHN S. GRAHAM, ET AL.,
Members of the Atomic Energy Commission of the United States,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

FRANCIS HEISLER
CHARLES A. STEWART,
P. O. Drawer 3996
Carmel, California

OLIVER ELLIS STONE
1500 Massachusetts Ave., N.W.
Washington 5, D. C.
Attorneys for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

LINUS C. PAULING, S. ADLER,
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Members of the Atomic Energy Commission of the United States,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners named in the caption and the additional plaintiffs named in the original complaint and in the amendment thereto[1] pray that a Writ of Certiorari issue

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[1] There are 255 plaintiffs whose names, addresses, and occupations are set forth in the complaint and the amendment thereto as printed in the Joint Appendix filed as part of Appellants' Brief before the United States Court of Appeals for The District of Columbia Circuit. Page references thereto are designated thus: (J.A. p. —). Page references to The Transcript of Record are designated: (TR. p. —)

to the United States Court of Appeals for the District of Columbia Circuit, which affirmed a decision and judgment of the United States District Court for the District of Columbia, dismissing the complaint.

OPINIONS BELOW.

The order of the District Court dismissing the complaint was on the ground that (1) the petitioners have no standing to sue the respondents, (2) that the complaint fails to state a justiciable controversy between the petitioners and the respondents, and (3) the judgment of the District Court for the District of Columbia Circuit in Civil Action No. 866-58, which was affirmed by the Court of Appeals for the District of Columbia Circuit and in which this Court denied certiorari, constitutes *res judicata* in the present action. The order of the District Court dismissing the complaint is set forth on page 47 of the Joint Appendix, nine copies of which, pursuant to Rule 21 (4) of this Court are being filed herewith. The Joint Appendix, pp. 48, 49, 50, sets forth the Findings of Fact and Conclusions of Law on which the order of the District Court dismissing the complaint was bottomed.

Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit from the District Court's order dismissing the complaint. That Court, by its decision, affirmed the order of the District Court with the Chief Judge dissenting from the order of dismissal. The majority of the Court held that (1) petitioners had no standing to sue; (2) the complaint failed to state a justiciable controversy, (3) the actions and powers challenged were plainly authorized by law and

the constitution, and (4) the holding of the Court of Appeals[2] which affirmed the dismissal of the complaint in Civil Action No. 866-58, was *res judicata*.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. A copy thereof is attached hereto as Appendix "A".

JURISDICTION.

The date of the judgment sought to be reviewed and the time of its entry is December 23, 1963. It is set forth hereto attached as Appendix "B".

Petitioners, within the time provided by the rules, asked for a rehearing *en banc*, which rehearing was denied on the 23rd day of January, 1964. No application for extension of time within which the Petition for Writ of Certiorari was made and the present petition is filed within the time set forth in the rules.

The statutory provision believed to confer on this Court's jurisdiction to review the judgment in question by Writ of Certiorari is 28 USC 1254 (1) [62 Stat. 928].

QUESTIONS PRESENTED.

1. The complaint alleged that the respondents (defendants in the District Court and appellees in the Court of Appeals), the Secretary of Defense and the Chairman and members of the Atomic Energy Commission, having detonated and threatening to detonate nuclear weapons, which weapons produced and now produce and will produce radioactive fallout, caused thereby physical and genetic damage to the petitioners (plaintiffs in the District Court and the

[2] *Pauling et al. v. McElroy et al.*, 107 U.S. App. D.C. 372, 374; 278 F 2d 252, 254, cert. denied, 364 U.S. 835 (1960).

appellants in the Court of Appeals), and will cause such harm to them in the future. Was the motion to dismiss properly granted as against such charges?

2. Does the Atomic Energy Act authorize the respondents to explode nuclear weapons which produce radiation and radioactive debris which did, does and threaten in the future to contaminate the air which the petitioners breathe and the food they eat, and will cause them and their descendants somatic and genetic damage?

3. Is the holding of the Court of Appeals for the District of Columbia Circuit in *Pauling et al* v. *McElroy et al*, 278 F. 2d, 252 (1960) *res judicata* as to the instant case?

CONSTITUTIONAL, STATUTORY, TREATY AND CODE PROVISIONS INVOLVED.

(For the convenience of the Court and because of the length of these provisions, they are set out in full in Appendix "C".)

a.) 1 USC Sec. 112 and 112a.

b.) 28 USC 1350; 62 Stat. 934.

c.) Atomic Energy Act (42 USC 2011 *et seq.*; 68 Stat. 931 *et seq.*).

d.) Treaties of Friendship with: Austria (47 Stat. 1876; 1899 TS 838, see also Art. VIII and IX, 10 Stat. 1005, 18 Stat. (2) 16, TS 4), Brazil (Art. XII, 8 Stat. 390; TS 34), Columbia (New Granada), (Art. XII, 9 Stat. 881; 18 Stat. (2) 550; TS 54), Denmark (Art. II, 8 Stat. 340; TS 65, see also Art. V and protocol (1), 12 UST 908; TIAS 4797), Finland (Art. I and XVI, 49 Stat. 2659; TS 868), France (Art. III and protocol (3), 11 UST 2398, TIAS 4625), Federal Republic of Germany (Art. VI and

protocol (6) and (7), 7 UST 1839, TIAS 3593), Great Britain (Art. II and III, 8 TIAS 416; TS 105), Holland (Art. VII, 8 Stat. 32; TS 249), Hungary (Art. I (3) 44 Stat. 2441, TS 748), Israel (Art. I and XIII, 45 Stat. 2618; TS 764), Italy (Art. V (4) (63 (2) Stat. 2255; TIAS 1965), Japan (Art. IV (1) and protocol (1), 4 UST 2063, TIAS 2863), Norway (Art. I and XII, 47 Stat. 2135; TS 858), Poland (Art. I, 48 Stat. 1507; TS 862), Sweden (Art. III, 8 Stat. 60, TS 346), Switzerland (Art. 1, 11 Stat. 587; 18 Stat. (2) 748; TS 353), Yugoslavia (Art. IV, 22 Stat. 963, TS 319).[1]

e.) A Treaty of Friendship, Establishment of Navigation between the United States and Belgium and related protocol was signed on February 21, 1961. This treaty is awaiting ratification.

f.) Articles 55, 56, and 74 of the United Nations Charter (59 Stat. 1031).

g.) Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE.

The complaint of *Pauling et al* v. *McNamara et al* was filed under No. 1986-62 in the United States District Court for the District of Columbia and upon the order dismissing the appeal was taken to the United States Court of Appeals for the District of Columbia Circuit No. 17, 797.

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[1] "The texts of the treaties as published in the *United States Statutes at Large*, (cited "Stat.") and the *United States Treaties and Other International Agreements* (cited "UST") are legal evidence in all courts of the United States, the Territories and possessions of the United States (1, U.S.C. 112 and 112a, respectively). The Treaty Series (cited "TS") was replaced by *Treaties and Other International Act Series* (cited "TIAS") in 1945."

The complaint alleges:

That the 186 plaintiffs named in the complaint and additional 69 named in the amendment to the complaint (all of whom are petitioners)* are natural persons. The majority are citizens and residents of the United States; others of the petitioners are citizens and residents of Austria, Iceland, Yugoslavia, Italy, Norway, Canada, France, Belgium, New Zealand, Great Britain, Japan, Republic of Germany, Sweden, India, Mexico, Switzerland, Israel, Denmark, Australia, Columbia, Finland, Hungary, Brazil, Czechoslovakia, Poland, and Republic of Panama. (J.A. pp. 4-22 and 40-45).

Respondents here (defendants and appellees below) are the Secretary of Defense and the Chairman and members of the Atomic Energy Commission (J.A. pp. 22 and 46); the plaintiffs constitute a class so numerous as to make it impractical to bring them all before the Court, however, the plaintiffs named in the complaint and in the amendment thereto fairly ensure adequate representation of all, and therefore, the named plaintiffs are suing on their own behalf and on behalf of all others similarly situated; that between 1951 and 1956 the defendants and their predecessors in office caused to be detonated 63 nuclear weapons in 11 test series, in 1957 they caused detonation of additional nuclear weapons in excess of 20; they detonated a further series in 1958; the size of the nuclear weapons varied from small fission bombs having the equivalent of 1,000 tons of TNT (1 kiloton) to sizes having an explosive energy of 20 million tons of TNT (20 megatons); among the atomic weapons so detonated by defendants and their predecessors are fission bombs, fission-fusion bombs, and

* One of the plaintiffs died after the filing of the complaint (Prof. Kermit Eby) and one of the plaintiffs did not join in the appeal (Florence Kiper Frank)

fission-fusion-fission bombs; the weapons so detonated yield radioactive contamination which is released in the world's atmosphere and the fission yield resulting from the weapons tested increased from 1945 to 1958 from 60 kilotons to 19,000 kilotons; the defendants at the time of filing the complaint were in the process of detonating another series of atomic weapons around Christmas and Johnston Islands, the fission yield of which may be in excess of 10 megatons; the plaintiffs simultaneously with the filing of the instant suit forwarded a complaint to the authorities in Moscow, USSR, requesting judicial relief from that country's counterpart court to the same effect as the relief is asked in the instant suit; the Russian complaint charges that the Russian defendants and their predecessors caused the detonation of atomic weapons having a fission yield increasing in 1943 from 60 kilotons to 21,000 kilotons in 1958. (J.A. 3, 22-24)

That the nuclear weapons which were detonated by the defendants and their predecessors heretofore and which they continued to detonate during the year of 1962 resulted and will result in world-wide exposure of human beings to radiation which is in addition to that resulting from the natural background radiation and to the X-ray radiation resulting from the healing arts and industrial application (J.A. pp. 24, 25); the past and threatened future acts of the defendants did and will cause world-wide fallout and radioactive debris, did and will increase the radioactive strontium content of the soil and the radioactive carbon content of the air and thus will increase the amount of contamination of the food supply of the world and the contamination of human beings (J.A. p. 25); the past and threatened future acts of the defendants did and will cause the plaintiffs to be damaged genetically, somatically and psychologically; will cause their progeny

to be deleteriously affected and with high probability, did and will cause the plaintiffs to suffer various diseases which they would not suffer but for the additional radiation resulting from the acts of the defendants (J.A. p. 25).

The processes whereby atoms produce radiation by reactions of the atomic nuclei is called radioactivity. Material containing atomic nuclei is called radioactive material. The energy of the radiation emitted by the nucleus of an atom disrupts or ionizes molecules by separating the electrons (J.A. p. 25); the effects of ionizing radiations on living cells are chemical in nature (J.A. p. 25); the detonation of nuclear weapons is accompanied by intense nuclear radiation as well as thermal radiation; in addition to the radioactive atomic nuclei, there are a great many neutrons produced which in reaction with non-explosive materials produce radioactive atomic nuclei (J.A. p. 26); the radioactive materials so created by the detonation of the nuclear weapons after being disseminated in the troposphere and stratosphere are deposited on the surface of the earth where they bring about an exposure of human beings to radiation, both internally and externally (J.A. p. 27).

Penetrating radiation of the sort produced by radioactive fallout does harm to the human body and to the pool of human germ plasm that determines the nature and well-being of future generations of human beings; exposure of the reproductive organs results in genetic damage through the production of genetic mutations. There is a change in the hereditary material of an organism, a change in the genes and chromosomes on which heredity depends; germ plasm is the hereditary material that is transmitted to the offspring and determines its nature (J.A. p. 28); almost all mutations are harmful to human beings; they result in fetal death, still-births and

serious physical and mental defects increasing the amount of human suffering (J.A. pp. 28 and 29); the mutant gene that is produced by a mutation is passed down to subsequent generations, and may do harm far in the future (J.A. p. 29); the number of mutations produced by radiation is proportional to the amount of radiation received by the reproductive organs; any amount of ionizing radiation, however small, that reaches the gonads of a human being who may later reproduce involves a risk proportional to that amount (J.A. p. 29).

There is a high probability that radioactive fallout is producing and will produce additional cases of leukemia, bone cancer, and other diseases that will lead to thousands or tens of thousands of deaths that would not have occurred or would not occur if the nuclear weapons would not have been detonated (J.A. pp. 29 and 30); fission reactions of nuclear weapons produce radioactive strontium, called strontium-90, which drops to the surface of the earth taken up by growing plants and ingested by man and is deposited in the bones. There it emits beta particles and becomes yttrium-90, also beta-emitter; these radioactive particles do damage to the tissues in the neighborhood of the bones and also the bone marrow that normally produce constituents of the blood, and with great probability this process results in leukemia and bone cancer (J.A. pp. 30 and 31).

Radioactive iodine, called iodine 131 is produced by the explosion of nuclear weapons and this concentrates in the thyroid of human beings and may cause cancer in that part of the anatomy (J.A. p. 31); nuclear weapon explosions release neutrons which react with nitrogen nuclei in the air to produce carbon-14 or radioactive carbon. This, which has a half life of about 5,600 years, will cause substantial genetic damage to human beings (J.A. p. 31);

plaintiffs believe that carbon-14 produced by nuclear weapons tests up to and including 1958 will cause 100,000 gross defects, 380,000 still-births, and childhood deaths and 900,000 embryonic and neo-natal deaths. (J.A. pp. 31 and 32). Scientists dealing with emotional problems of human beings believe that the testing of nuclear weapons resulted and will result in emotional disturbance of the peoples of the world, particularly the young ones, and that such emotional disturbance will create great mental suffering. Plaintiffs believe that defendants' acts cause and will cause them and their descendants to be psychologically affected, and therefore, will suffer emotionally (J.A. p. 32).

The defendants are threatening to presently explode a nuclear bomb as part of the test series around Johnston Island, the detonation to take place at such height that it will likely destroy the Van Allen Radiation Belt and interference with such radiation belt will deleteriously affect the plaintiffs and their descendants for generations to come (J.A. p. 32).

By reason of the acts of the defendants and the facts described in the foregoing, the plaintiffs say that there is a controversy between them and the defendants; that the defendants' acts are illegal, unlawful and beyond their scope of authority for the reasons that (a) the Atomic Energy Act under which the defendants are purportedly acting, does not authorize them to detonate nuclear weapons creating radiation that damages the plaintiffs and their progeny, and the defendants' acts are beyond the scope of the authority granted by the Act; (b) Congress has unlawfully delegated legislative powers to the defendants in that the Atomic Energy Act contains no standards by means of which the Congressional intent

is carried out; (c) the provisions of the Atomic Energy Act are so vague, indefinite, and uncertain as to unlawfully vest arbitrary powers in the defendants, and therefore, the Act is in violation of due process of law as set forth in the Fifth Amendment to the Constitution; (d) if the defendants are acting within the scope of their authority as set out in the Act and if Congress did not delegate legislative power to the defendants, and if the Act is not in violation of due process, then the Atomic Energy Act is unconstitutional in that the Constitution did not delegate to Congress any power to enact legislation as a result of which the atmosphere will be contaminated and plaintiffs' lives and that of their progeny will be damaged; said legislation is contrary to the Human Rights Provisions of the Charter of the United Nations (J.A. pp. 33 and 34).

Plaintiffs claim that due to the unlawful and unconstitutional acts of the defendants, they suffered irreparable injuries, and ask for a declaratory judgment and injunction restraining the defendants from continuing their illegal and unconstitutional acts, and if the prayer involves the constitutionality of an Act of Congress, the plaintiffs ask that the matter be heard by a three-judge Court (J.A. pp. 34 and 35).

Defendants filed a motion to dismiss the complaint on the ground that (1) Civil Action No. 866-58 affirmed by the Court of Appeals and Certiorari denied by this Court is *res judicata*, that (2) the plaintiffs lack standing to sue, and (3) the complaint fails to present a justiciable controversy (J.A. p. 36). The United States District Court granted respondents' motion, and dismissed the complaint (J.A. p. 47), which order of dismissal plaintiffs appealed to the United States Court of Appeals for the District of Columbia Circuit (J.A. p. 51), which Court affirmed the order of the District Court (Appendix "B").

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING THE REASONS.

The issues herein presented raise important questions of constitutional, statutory and treaty law which, as far as petitioners know, have not been, but should be, settled by this Court:

1. This Court has never decided the important question whether or not the decision in a case in which ten of the 255 present plaintiffs were plaintiffs suing on their own behalf is *res judicata* as to the issues raised by the present class suit.

2. This Court has never decided the important question as to whether or not citizens and residents of friendly foreign countries with which this country has Treaties of Amity and Friendship providing mutual access to the Courts of Justice have the right to sue in the Courts of the United States for redress against acts of officers of the United States which acts have far reaching effect outside the territorial limits of this country and which acts result in damage to their lives and well being and to that of their progeny.

3. This Court has never decided the important question as to friendly aliens' standing to sue in the face of the admitted allegations that respondents, by detonating nuclear weapons, cause world-wide radioactive fallout, and thereby bring such friendly aliens within the jurisdiction of our Courts because of the admitted allegations as to the injuries suffered by such friendly and non-resident aliens.

4. This Court has never decided the important question whether or not the enormity of the admitted damage resulting from radiation and radioactive fallout require

the Court's determination as to the respondents' act being or not being within the constitutional powers of the executive and its agents.

5. This Court has never decided the question whether or not the Atomic Energy Act authorizes the respondents to engage in and continue acts which result in radiation and radioactive fallout affecting all the petitioners, including the non-resident friendly aliens.

6. This Court has never decided the important question whether or not the concept of due process protects petitioners against the acts of respondents, acts admittedly resulting in somatic, genetic and psychological damage to the petitioners and their progeny in accordance with the allegations of the complaint.

ARGUMENT.

PRELIMINARY STATEMENT.

The opinion of the Court of Appeals for the District of Columbia Circuit correctly summarizes the complaint by which the petitioners

> "sought a declaratory judgment to restrain and enjoin the Secretary of Defense and the members of the Atomic Energy Commission from detonating any nuclear weapons that produce radiation or radioactive atomic nuclei or alternatively to issue such injunction effective only when, and if, a similar injunction is issued by the Supreme Court of the Union of Soviet Socialist Republics from which, it is alleged, similar relief is being sought."

The opinion of the majority of the Court of Appeals (page 2) then reviews the decision of the District Court, stating that that Court

> "granted appellee's motion to dismiss the complaint on the grounds that (1) plaintiffs had no standing to use; (2) the complaint failed to state a justiciable controversy, (3) the actions and powers challenged were plainly authorized by law and the Constitution, and (4) the holding of the Court of Appeals, which affirmed the dismissal of a complaint in Civil Action No. 866-58, was res judicata."

and concludes that

> "The District Court was plainly correct on all points."

(see page 2 of the Opinion).

The next paragraph of the Court's majority opinion, while in part presenting extraneous and as petitioners be-

lieve unjustified conclusions, reaches the crux on which the decision is bottomed when it says

> "In light of the historic limits on judicial power vis-a-vis the other coordinate branches of government and especially in light of our prior clear holding that a claim such as now asserted presents no justiciable controversy, it is difficult to escape an impression that the appellants, no matter what their motives, may be more interested in exploiting the judicial process as an implement of propaganda than in securing any judicial mandates that could conceivably be anticipated."

The opinion also states that

> "In our 1950 holding we tried, perhaps too tersely because the point seemed so plain, to make clear that decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them."

Petitioners believe that the formulation of the Court of Appeals' majority opinion indicates that the dismissal of the complaint by the District Court was upheld primarily because it was considered the holding of the Court of Appeals in *Pauling et al* v. *McElroy et al*, 107 U.S. App. D.C. 372, 207 F. 2d 252, to be *res judicata* as to the issues raised in the instant case. Because of such understanding of the opinion, petitioners will first argue the question of *res judicata*.

I.

Pauling et al vs. McElroy et al is not Res Judicata as to the Instant Case.

Comparing the allegations of *Pauling* v. *McElroy* with that now before this Court, there are significant differences. The first of these being that the instant suit is

clearly designated and presented as a class suit while the prior one did not intend to be and was not anything more but a complaint of 18 individuals suing on their own behalf.

The present complaint, while relying on the basic scientific allegations as set forth in the prior complaint, adds matters which are based on new discoveries, particularly those which pertain to the results of ionizing radiation and to the effect of heretofore little known isotopes resulting from the detonation of nuclear weapons. A further difference is that while the prior complaint alleged that the stratospheric fallout resulting from the detonation of nuclear weapons is of a uniform world-wide distribution, the instant complaint relies on the recently accepted scientific holding that such fallout is non-uniform (J.A. p. 28). The earlier complaint did not allege any act of respondents which would or could have interfered with the Van Allen Radiation Belt. The instant complaint charges that the respondents are "threatening to explode a nuclear bomb during the present series of testing around Johnston Island" and then expresses the fear that if such act is carried out the explosion will be "at such heights that it may and likely will destroy the Van Allen Inner Radiation Belt", which "interference with the radiation belt the plaintiffs believe will deleterrously affect them and their descendants for generations to come" (J.A. p. 32). The instant complaint refers, as the prior one does not at all, to the effect of the radioactive isotope Carbon-14 (J.A. p. 31). The instant complaint also refers, as the prior one does not, to the effect of the radioactive Iodine-131. In juxtaposing the two complaints, one finds that the prior one makes no reference whatsoever to the psychological effect of the detonation of nuclear weapons upon the petitioners, while the present complaint makes use of

the accumulated knowledge in that field and claims that the plaintiffs and their descendants will be emotionally injured because of the act of the respondents (J.A. pp. 31 and 32).

Last but not least, while the present complaint is a true class suit filed by 255 plaintiffs, however, each on his own behalf and on behalf of all others similarly situated, claims individual injuries resulting from the acts of the respondents. The present complaint clearly and without any ambiguity alleges specifically threatened injuries to the petitioners and their progeny. It also alleges damages to the petitioners (J.A. pp. 25 and 34). There is a further significant difference between the two complaints in that the opinion of the Court of Appeals in *Pauling et al v. McElroy et al*, indicates that at the time when the decision of the issues was considered, the respondents ceased testing nuclear weapons while at the filing of the present complaint, the testing was continuing at an increased rate, (J.A. p. 23).

Res judicata precludes further litigation of the same cause of action by the same parties or those in privity with them and those bound by the judgment. *Res judicata* to be invoked must present a final, valid judgment and the judgment must be on the merits. *Baltimore SS Co. v. Phillips* (1927), 274 US 316, 47 Sup. Ct. 200, 71 L. Ed. 1609.

While there was a final judgment in *Pauling et al v. McElroy et al*, 164 F. Supp. 390, however, the judgment was not on the merits. In that case, the parties were not the same who are now before the Court and the plaintiffs in the present case are not in privity with the plaintiffs of the former one. The allegations of the instant complaint point to such grossly increased effects that the quantitative changes must be considered qualitative ones.

While it is true that Linus C. Pauling, Bertram Russell, Karl Paul Link, William Bross Lloyd, Jr., Norman Thomas, Stephanie May, L. John Collins, G. Michael Scott, Brock Chisholm, D. Martin Niemoëller and Andre Trocmé are petitioners here and were plaintiffs in the *Pauling et al* v. *McElroy et al* suit, however, they are appearing presently in a class suit in their representative capacities, and therefore, they are not the same persons who appeared in the prior suit because

> "A rule often repeated in elaboration of the requirement of identity of parties, states that one is not bound by a judgment entered in a case where he sued or defended in his individual capacity when such judgment is pleaded as *res judicata* in a subsequent suit where he appears only in a representative character; and the doctrine as thus stated may be accepted as satisfactorily expressing the law applicable to a vast number of situations where the change of capacity represents an actual change in the real parties in interest." (38 Yale Law Rev. pp. 309-310, Robert von Moschzisker.)

It is also said that

> "The rights of beneficiaries such as legatees, devisees, minors and others, are protected from being concluded by former judgments to which the fiduciary representing them in a subsequent action was a party in an individual capacity." (*op. cit.* page 310.)

See also 1 Greenleaf, *Evidence*, para. 523 (15th Ed., 1892), 30 *Am. Jur.* 1951 (1940).

Respondents submit that the prior case of *Pauling* v. *McElroy* (*supra*) is not *res judicata* because that case was not decided on the merits and it was said

> "Judgments of nonsuit, of *non prosequitur* or *nolle prosequi*, of discontinuances, and of dismissal generally, are exceptions to the general rule when the pleadings, the Court and the parties are such as to permit a trial on the merits; the judgment will be considered final and conclusive of all matters which could have been so tried." 2 Freeman, Judgments (5th Ed.) 1579-1580.

It was also pointed out that

> "Generally speaking, judgments merely of dismissal, whether voluntary or involuntary, in actions of law are not on the merits and do not operate as a bar or estoppel in subsequent proceedings involving the same matters." Freeman op. cit. P. 1582.

The Restatement of Judgments (pages 208-210) teaches that under Rule 41 (b) of the Federal Rule of Civil Procedure an involuntary dismissal as was entered in *Pauling v. McElroy*, (*supra*) is not on the merits because

> "Such a judgment does not preclude the plaintiff from maintaining an action on the original cause of action. It is not a judgment denying the validity of plaintiff's claim and is not, therefore, a judgment on the merits."

The Restatement of Judgments (Para. 54, pp. 211-212) further teaches that

> "When a judgment is received for defendant on the ground of the non-existence of some fact essential to the plaintiff's cause of action, the plaintiff is not precluded from maintaining an action after such fact has subsequently come into existence."

Petitioners respectfully ask that this Court take judicial notice of the briefs and pleadings filed in the case of *Pauling et al. v. McElroy et al.* which case was numbered 14742 and 14743 in the Court of Appeals for the District of Columbia Circuit. From the Findings of Fact and Conclusions in Law entered in that former case, it appears

that the dismissal was entered solely on legal grounds because the Trial Court held that "plaintiffs cannot, *as a matter of law*, ultimately prevail in these actions". (Emphasis added)

The Trial Court in the former case also held that plaintiffs "have not established such an imminent threatened invasion of a legal interest of their own as to give them standing to sue with respect to a justiciable controversy within this Court's jurisdiction."

Judge Von Moschzisker in his study printed in 38 Yale Law Review, pp. 300 ff. states that

> "For purposes of *res judicata*, there is identity of causes of action when in both the old and new proceedings the subject matter and the ultimate issues are the same; but beyond this, the determination of the question must rest in the sound discretion of the courts as applied to the circumstances of each case, having proper regard both to the public policy of *res judicata* and to the rights of the parties to have every bona fide issue passed upon."

Petitioners submit that the Court of Appeals erred in holding that the decision in *Pauling* v. *McElroy* is *res judicata* and the error is such that it requires correction by this Court because as Chief Justice Bleckley of Georgia said

> "When an error of this magnitude and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a Supreme Court,—supreme in the majesty of power—is not *stare decisis*, but *fiat justitia ruat coelum*." *Elkison* v. *Georgia Railroad*, (1891) 87 Ga. 691, 13 SE 809.

Petitioners recall with Professor Moore that

> "It is not conducive to give to the law of the case the effect of *res judicata* because when a court becomes

convinced that its declared law of the case is erroneous and would work a grave injustice it should have the power to apply a different rule of law in the interest of getting the very case before it settled in a just manner." *Moore, Federal Practice*, 2nd Ed. 1-Para. 0.404 (1) p. 4204.

Justice Rutledge, speaking for the Court in *Cook* v. *Fortson*, 329 U.S. 675, 67 S. Ct. 21, stated

> "The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction, see *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 300, 63 S. Ct. 1070, 1074, 87 L.Ed. 1407; *Di Giovanni* v. *Camden Fire Ins. Ass'n*, 296 U.S. 64, 70, 56 S. Ct. 1, 4, 80 L.Ed. 47, in one case is not precedent in another case where the facts differ. *Hale* v. *Allinson*, 188 U.S. 56, 77, 78, 23 S. Ct. 244, 252, 253, 47 L.Ed. 380, quoted in *Di Giovanni* v. *Camden Fire Ins. Ass'n*, *supra*, 296 U.S. at page 71, 56 S. Ct. at page 4, 80 L.Ed. 47."

Justice Rutledge's above opinion is cited with approval in *Baker* v. *Carr*, (1962) 369 U.S. 186, 82 S. Ct. 691. Justice Brennan, speaking for the Court in the *Baker* case *supra*, quotes Judge Rutledge from *Cook* v. *Fortson* to the effect that

> "The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction . . . in one case is not precedent in another case where the facts differ, 329 U.S. at 678, n. 8, 67 S. Ct. 21 at 22, 91 L.Ed. 596 (citations omitted)."

Petitioners submit that the facts alleged in the case of *Pauling* v. *McElroy* *supra*, differ so widely from the fact situation in the instant case that it must be held that the Trial Court erred when it dismissed the case on the ground of *res judicata* and the Court of Appeals similarly erred when it held that the District Court was correct in so deciding.

The issue of *res judicata* as it is dealt with herein is of sufficient newness and importance to warrant the granting of a petition for certiorari and further warrants full consideration by this Court.

II.

The Complaint Presents a Justiciable Controversy and all of the Plaintiffs have Standing to Sue.

Guessfeldt v. *McGrath*, 342 U.S. 308, 72 S. Ct. 338 is authority for the holding in *Calloway* v. *Hamilton National Bank of Washington*, 91 App. D.C. 314, 195 F. 2d 556 (1952), wherein it was stated

> "A motion to dismiss should not be sustained 'unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim' set forth by the plaintiff."

In *Polk Co.* v. *Glover*, 305 U.S. 5, 59 S. Ct. 15, this Court held

> "We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. . . . The salutory principle that the essential facts should be determined before passing upon grave constitutional questions is applicable."

Borden's Farm Products v. *Baldwin*, 293 U.S. 194, 55 S. Ct. 187, is authority for the holding that

> "We are in accord with the view that it is inexpedient to determine grave, constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

As in the above cases, the complaint and the amendment thereto present weighty constitutional and legal questions as to the right of the respondents to proceed with the detonation of nuclear weapons even though such detonation results, as it is charged in the complaint, in radioactive fallout, which fallout, as it is admitted by the Motion to Dismiss, results in damage to the individual petitioners.

Petitioners submit that their complaint presents justiciable controversy and the same ought not to be resolved on a Motion to Dismiss.

Petitioners believe that in accordance with *Marbury* v. *Madison*, 1 Cranch 137, 163, 2 L.Ed. 60, the controversy between them and respondents ought to be resolved by the Court on the merits because

> "The very essence of civil liberty certainly consists in the rights of every individual to claim the protection of the laws, whenever he receives an injury."

The Court of Appeals' majority opinion (page 3) states that

> "In our 1960 holding we tried, perhaps too tersely because the point seemed so plain, to make clear that decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them."

This holding collides head-on with this Court's decision in *Baker* v. *Carr* (supra), where it was said

> "The non justiciability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution

to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine."

In the *Baker* case, this Court also held that ". . . it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." This Court further said that "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. . . ."

Petitioners submit that on the teachings of *Baker* v. *Carr*, this Court ought to hold that the District Court and the Court of Appeals both erred in dismissing the complaint and the amendment thereto.

Petitioners earnestly ask this Court to analyze the holding of the Court of Appeals and consider the ultimate import of the phrase that the case presents "no judicially cognizable issues and hence the courts are not empowered to decide them"; when basic national policies are involved. The ultimate meaning of this statement is, the one now gratefully in disrepute, that the "King can do no wrong." In effect, it means that the defense of the Nazi leaders in Nuremberg was a valid one when they claimed that they acted upon the order of the head of the State, which order cannot be questioned.

While the opinion of the Court of Appeals may be read as if petitioners would desire to depart from basic constitutional concepts when in fact, they are trying

to uphold it as against the totalitarian principle. The Court of Appeals seems to hold, nay it holds, that the acts of the executive are beyond judicial review. The majority opinion says that actions challenged by the complaint "plainly falls in that area where the Executive and Legislative Branches are supreme and final.", thus falling into the error warned against in *Baker* v. *Carr* which teaches "the need for case by case inquiry."

In the case of the *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 71 S. Ct. 624, as well as *In Re Summers*, 325 U.S. 561, 65 S. Ct. 1307, this Court found that the complaints presented justiciable controversies even though the government attorneys representing the defendants violently objected to the "case by case inquiry."

Petitioners submit that in accordance with basic constitutional principles as they were interpreted by this Court, not only recently, but as long ago as in *Marbury* v. *Madison* (supra), they are entitled to their day in Court and to have "an opportunity to prove their case, if they could," as was held in *Polk* v. *Glover* (supra), since the facts alleged in their complaint are not less, but more sufficient than it was in the former case.

The Court of Appeals' majority opinion is wholly silent why that Court believed that the plaintiffs had no standing to sue. Because of this silence, we have to refer to the Court of Appeals' former opinion in *Pauling* v. *McElroy* where it is stated that "standing to sue, even as to the citizens of the United States does not arise out of such general and indefinite allegations of inquiry." As to the non-resident aliens standing to sue, the Court of Appeals in a footnote refers to the case of *Johnson* v. *Eisentrager*, (1950), 339 U.S. 763, 70 S. Ct. 936. As to the standing of respondents who are residents and

citizens of this country; we submit that even if the former complaint was general and indefinite as to the allegations of the injuries, the instant complaint is specific and definite. The complaint here states that "the defendants past and future threatened acts of exploding nuclear weapons did and will cause the plaintiffs to be damaged genetically, somatically and psychologically; will cause their progeny to be deleteriously affected. . . ." (J.A. p. 25). Such allegation is neither general nor indefinite, and therefore the standing to sue of the resident petitions ought not and cannot be challenged.

Johnson v. *Eisentrager* (supra) has no pertinency here to the alien petitioners, since that case involves the appeal to our Courts of German soldiers, enemy aliens, who were fighting the American troops in China after the termination of the war and who were captured in China, tried by military courts in China, and imprisoned in Germany. The inapplicability of the *Johnson* case here is clearly indicated by Justice Jackson's introductory sentence stating that "the ultimate question in this case is one of jurisdiction of our civil courts of the United States *vis-a-vis* military authorities in dealing with enemy aliens overseas."

Even a cursory reading of the *Johnson* case will indicate that that case decided nothing but the status of those who made war upon this country on foreign territory and who were convicted by a military commission *without* the confines of the United States and who was imprisoned *outside* this country when they asked for a writ of *habeas corpus*.

The dissenting opinion of Justice Black (joined by Justices Douglas and Burton) becomes pertinent to the issues presented here when in footnote 3 Justice Black refers to Ex Parte *Kumezo Kawato*, 317 U.S. 69, 63

S. Ct. 115, as authority against the restrictive philosophy which would prevent a non-resident friendly alien to bring a civil suit in American courts. The opinion of the Court in the *Kawato* case written by Justice Black speaks for the whole of the Court and upholds petitioners' claim that they have standing to sue in the instant case. Kawato, a resident in this country during the second World War, was born in Japan and filed a civil suit here for damages. The District Court abated the action on the ground that petitioner was an enemy alien and had no right to prosecute any action during the war. Kawato sought mandamus in the Court of Appeals for the Ninth Circuit, but his motion for leave to file was denied. Certiorari was granted and the Supreme Court held that Kawato has the right under the Common Law and Treaties to proceed with his action and that this right is not limited by statute. The Court's view was that:

> "The possibility of treaty rights, which has not been argued extensively, need not be considered. Applicable treaties are ambiguous and should not be interpreted without more care than is necessary in this case."

and on other ground the Supreme Court ordered the writ to be issued.

The opinion of this court in the *Kawato* case should have made it necessary for the Court of Appeals to interpret the rights of the non-resident friendly alien respondents, which rights result from the existing Treaties of Amity and Friendship. The Court of Appeals wholly failed to look to such treaties when in the majority opinion stated that "The District Court was plainly correct on all points", including the point that "plaintiffs had no standing to sue." This Court indicates that it has no quarrel with the exclusion from our Courts of

aliens who "reside during the war within the territory occupied by the enemy," at the same time it concluded that

> "Congress expressly recognized by the passage of the Act that the more enlightened views of the present days as to treatment of enemies makes possible certain relaxations in the old law."

This Court referred to the report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., and concludes that "The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them."

Petitioners submit that they are neither enemy aliens nor are they excluded by administrative or legislative action from the Federal Courts. On the other hand, they consider existing Treaties of Amity and Friendship between this country and their respective homeland as a mandate that the Federal Courts be open to them and their standing to sue be recognized.

Petitioners submit that this Court ought to grant certiorari so that upon full hearing of the case, this Court may reverse the order and judgment of the District and Court of Appeals and thus permit petitioners to have their day in Court.

III.

The Effect of Respondents' Act is World-Wide and the Jurisdiction of the Court Ought to be Similarly Extended.

The complaint (V)(c), states that

> "The atomic weapons so detonated (by the respondents) yield radioactive contamination which is released into the *world's atmosphere*. . . ." (J.A. p. 23)

It is also alleged (V)(i)

> "The nuclear weapons which were detonated by the defendants and their predecessors prior to this time and which they began and continue to detonate during the year of 1962 resulted and will result in *world-wide exposure of human beings to radiation* in addition to that of the natural background radiation and to the X-ray radiation resulting from the healing arts and industry. The past and threatened future acts of the defendants did and will cause *world-wide fallout of radioactive debris*, did and will increase the radioactive strontium content of the soil and the radioactive carbon content of the air and the amount of contamination of the food supply of the world and of the bones of human beings." (J.A. pp. 24 and 25)

The complaint further alleges that (V)(j)

> ". . . the defendants' past and threatened future acts of exploding nuclear weapons did and will cause the plaintiffs to be damaged genetically, somatically and psychologically; will cause their progeny to be deleteriously affected because of the additional radiation brought about by the acts of the defendants, and, with high probability, did and will cause the plaintiffs to suffer various diseases which they would not suffer but for the additional radiation brought about by the acts of the defendants." (J.A. p. 25)

Petitioners' complaint also alleges that (VI)(f)

> "There is also a high probability that damage is being done to the health of human beings now living that is comparable to the genetic damage that is being produced by fallout and that will impair future generations. There is a high probability that fallout radioactivity is producing and will produce additional cases of leukemia, bone cancer, and other diseases that will lead to thousands or tens of thousands of deaths of human beings that would not have occurred or would not occur if the tests of nuclear weapons were not carried out." (J.A. p. 30)

The motion to strike the complaint left all well pleaded allegations standing, and thus petitioners claim that respondents' past, present and future acts pertaining to the detonation of nuclear weapons having a world-wide effect remains unchallenged. It is also left without challenge the allegation that irrespective of the residence of petitioners, be that in the United States, or Takata-toyokawa cho, Bunkyo-ku, Tokyo, Japan, Goldern-Hasliberg, B.O. Switzerland, or Trondheim, Norway, the injuries resulting in respondents' act will reach out to find the plaintiffs wherever they may be.

Petitioners submit that if law means what it ought to, if national or international law was invented and was expanded to provide remedies, then the jurisdiction of our federal courts must follow to the outer limit of the expanse to which the wrong done reaches. Uncontradicted allegations of the complaint shows that respondents reached out as the result of the exploding nuclear bombs and caused plaintiffs to be contaminated by radioactivity irrespective of their residence. To say that since the injuries resulting from respondents' acts took place outside of the territorial limits of the United States, and therefore without the jurisdiction of our federal courts would be tantamount to saying that technological innovations extending the effect of one's act for miles and miles from the place of commission, must remain without legal remedy.

Petitioners earnestly submit that this Court ought to re-examine the issues here presented because they believe that upon such re-examination, this Court will hold that the Court of Appeals erred when it failed to extend the protection of the federal courts to them who properly allege personal injuries resulting from respondents' acts.

Murphy v. *Butler*, 362 U.S. 929, 80 S. Ct. 756, or at least the dissenting opinion of Justice Douglas gives support to petitioners' claim that changing technological innovations and use of unknown matters may give rise, nay compels, a change in the judicial approach to the issues so newly presented. Justice Douglas dissented from the Court's refusal to grant certiorari to the United States Court of Appeals for the Second Circuit because

> "the issues involved in this case are of such great public importance that I record my dissent to the denial of certiorari."

The "great public importance" referred to by Justice Douglas pertained to the aerial spraying of DDT, which spraying had for its purpose the eradication of the gypsy moth which was allegedly injurious to forests. In that case the plaintiffs alleged that the threatened spraying (of DDT and kerosene) was unauthorized by statute and so injurious to health and property as to violate the Fifth and Fourteenth Amendments." They were given an opportunity to present evidence, as petitioners in this case were not, and their complaint was dismissed because the District Court found on the basis of the evidence presented that the spraying program was "not injurious to human health." Justice Douglas found that

> "the effect of DDT on birds and on their reproductive powers and on other wildlife, the effect of DDT as a factor in certain types of disease in man such as poliomyelitis, hepatitis, leukemia and other blood disorders, the mounting sterility among our bald eagles have led to increasing concern in many quarters about the wisdom of the use of this and other insecticides. The alarms that many experts and responsible officials have raised about the perils of DDT underline the public importance of this case."

and therefore, Justice Douglas believed that the questions presented "justify review by this Court". Petitioners, because of their "reverence" for all life, are gravely concerned about the reproductive powers of birds and other wildlife. They are, because of the same reverence, also concerned about the mounting sterility of the bald eagle, but they are not less concerned about the effect of radioactive fallout on their own reproductive powers and the injury that they believe will be caused thereby to them and to their progeny somatically and genetically.

Petitioners oppose the indiscriminate spraying of DDT and other pesticides, but they are concerned for themselves and for all others similarly situated of the calamitous effect of strontium-90, yttrium-90, carbon-14, iodine-131 and other radioactive fission and fusion products. They are concerned with the damage done to them and the irreparable injury resulting from respondents' acts in consequence of which radioactive isotopes heretofore unknown or known only to a minute extent, are being created. Petitioners submit that even assuming though not admitting, that the *Murphy* case did not show injury to the plaintiffs in that case, the radioactive fallout created by respondents as here complained of, are surely justified a review by this Court.

IV.

Judicial Review Power is not so Limited as the Court of Appeals Holds it to be.

The majority of the Court of Appeals for the District of Columbia Circuit refers to the

> "historic limits on judicial power vis-a-vis the other coordinate branches of government"

and on the basis of that Court's prior decision in *Pauling* v. *McElroy*, *supra*, concludes that petitioners' claim as

asserted in the complaint "presents no justiciable controversy" (page 2 of the Opinion). The majority of the Court of Appeals also found that the petitioners

> "now resort to the courts on some vague and disoriented theory that judicial power can supply some quick and pervasive remedy is no reason why we as judges should regard ourselves as some kind of Guardian Elders ordained to review the political judgments of elected representatives of the people. In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. But the basic and important corollary is that the people may remove their elected representatives as they cannot dismiss United States Judges. This elementary fact about the nature of our system, which seems to have escaped notice occasionally, must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make better decisions on such issues."

Petitioners submit that they are resorting to basic constitutional concepts and not to "some vague and disoriented theory". They do not believe that this Court will ever agree with the majority of the Court of Appeals that

> "the people are and must be, in a sense, at the mercy of their elected representatives."

Petitioners believe that "incalculable mischief" will result not from a review of the acts of the representatives but from refusal of our Courts to follow its constitutional duty to review the fiat of all governmental agencies.

Cooper v. *Aaron*, 358 U.S. 1, 78 S. Ct. 1401, goes back to 1803 and to Chief Justice Marshall, who in *Marbury* v. *Madison*, *supra*, taught that

> "It is emphatically the province and duty of the judicial department to say what the law is."

Justice Frankfurter quotes from the decision of *United States* v. *United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677, and the phrase of John Adams

> "'a government of laws and not of men' . . . He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court."

And again

> "So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what the courts are for."

Petitioners submit with Justice Frankfurter that

> "Law alone saves a society from being rent by internecine strift or rule by mere brute power however disguised."

Respondents disguise their acts resulting in radioactive fallout and injuries to plaintiffs by the need of the national defense. However, national security as envisioned by the Constitution did not include and cannot

include the dangers created by respondents' acts, which dangers were clearly elucidated by the complaint and were undenied by the motion to strike.

Justice Brennan in *Baker* v. *Carr*, *supra*, speaking for the Court held that

> "The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."

Petitioners are aware of the truism expressed by the majority of the Court of Appeals that judges are "neither gods nor godlike" but at the same time they also believe that the authority of our Courts is not as narrow nor as limited as to compel the Courts to abdicate their duty to measure the acts of the people's elected representatives by the yardstick of the Constitution. The Courts are empowered and are duty bound to decide whether the acts of the people's representatives are based on "rational nexus . . . between the content of a specific power in Congress and the action of Congress in carrying that power into execution." *Kennedy* v. *Mendoza-Martinez* (1963), 372 U.S. 144, 83 S. Ct. 554.

Petitioners submit that this Court ought to examine and determine whether there is "rational nexus" between national defense and the detonation of nuclear weapons which create damaging injuries from radioactive fallout.

As Judge Brennan, in his concurring opinion in the *Kennedy* case, *supra*, points out that it is necessary to determine whether the constitutional mandate is complied with to the effect

> "that legislation so profoundly destructive of individual rights must keep within the limits of palpable reason and rest upon some modicum of discoverable necessity."

Petitioners submit that respondents' acts complained of here, even if they were to be legislatively authorized, are so profoundly destructive of petitioners' individual rights that they must be considered without the limits of palpable reason.

If the right to travel and the right to exist discussed in *Kent* v. *Dulles*, 357 U.S. 116, 78 S. Ct. 1113, is a personal right included within the word "liberty" as used in the Fifth Amendment, then the right of petitioners to live out their life without radioactive contamination is surely part of that "liberty" that is protected by every concept of our Constitution. As it was said in *Kent*, *supra*:

> "If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. (Citations). Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. (Citations) We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen."

It cannot be gainsaid that limitation of the citizen's right to travel, while important, is more important than the life of the self-same citizen. It cannot be gainsaid that if this Court refuses to find the authority in the broad generalized power of Congress "to trench so heavily on the rights of the citizen" to travel, that it will not hesitate to hold that the broad generalized powers are insufficient to permit respondents to act in a manner that will endanger the life of petitioners and their offspring.

As Chief Judge Bazelon, in his dissent found, that the majority opinion "attributes greater limitations to judicial power than the Constitution requires." Judge Bazelon is supported by this Court when it said in *Trop* v. *Dulles*, 356 U.S. 86, 78 S.Ct. 590

> ". . . to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred. In making this determination, *the Court sits in judgment on the action of a co-ordinate branch of the Government* while keeping unto itself—as it must under our constitutional system—the final determination of its own power to act." (Emphasis ours)

Petitioners submit that the issues here presented may be novel, but not without the protection of the Constitution and of judicial review as set forth in the Constitution. Therefore, they submit that this Court should grant certiorari so that issues may be reviewed by this Court.

V.

The Standards, if any, Provided by the Atomic Energy Act, are Vague, Indefinite and Uncertain, and Vest Arbitrary Powers in Respondents in Violation of Due Process of Law.

The standards contained in the Atomic Energy Act (42 USC 2011, *et seq.*, 68 Stat. 921, *et seq.*) are vague and indefinite. These standards give no guidance and thus fail to prevent arbitrary conduct on the part of the respondents. The lack of standards is lack of due process, and therefore, the Atomic Energy Act cannot be upheld on the authority of *Connelly* v. *General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126; *Hague* v. *CIO*, 307 U.S. 496, 67 S.Ct. 1426; *Gelling* v. *Texas*, 343 U.S. 960, 72 S.Ct. 1002.

The lack of standards puts petitioners' well-being and their lives at the will of respondents. It ought not and cannot be done, because;

> "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064

This Court in *Watkins* v. *United States*, 353 U.S. 178, 77 S.Ct. 1173, held the phrase in the Congressional Act "Un-American propaganda activities" as so vague as to being considered inadequate as legal standards.

Of course, it may be argued that respondents as men of good will will set certain limits to their own acts so that the consitutional safeguards will be provided. However, as this Court said

> "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitional authority, for which the best of motives is not a substitute." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 420, 55 S.Ct. 241

In *U.S.* v. *United Verde Copper Co.*, 196 U.S. 207, 25 S.Ct. 222, this Court held that an executive official may not define a vague term and thus provide the safeguard of due process because if he were permitted to do so, then he would have the

"power to abridge or enlarge the statute at will, if he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

Petitioners submit that the dismissal of the complaint by the District Court and the affirming by the Court of Appeals was in violation of the United Nations Charter (59 Stat. 1031, *et seq.*) because the unlimited power imputed to the respondents by the order of the dismissal disregarded the charter provision as to "fundamental human rights." The order of dismissal violates the United Nations Charter which recognized petitioners' "dignity and worth of the human person". The dismissal further violated the Charter which established conditions "under which justice and respect" for the obligations arising from treaties and other sources of international law can be maintained. The dismissal disregarded the treaty rights involving Treaties of Amity and Friendship.

For this and all other reasons heretofore argued, petitioners submit that respondents' acts are contrary to law, contrary to the statutes of this land and contrary to international law. Petitioners should have been permitted to prove their allegations, if they can, and they respectfully ask this Court to grant their Petition for Certiorari so that the issues, weighty, as they are, may be reviewed by this Court.

CONCLUSION.

In *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, this Court attempted again to teach the concept of due process of law. That opinion negated the idea that due process is something formal or fixed or narrow. The Court held that it is neither, because

> "It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right . . "

Petitioners submit that the right to live out their lives uncontaminated by the radioactive fallout created by respondents is not less basic than any other right. They also submit that even if it were necessary to advance the standards of judicial review beyond that heretofore accepted as the outer limit of such review, there is no case conceptually more apt to call upon the advancement of standards than the issues here presented. The *Writ of Certiorari* should be granted.

Respectfully submitted,

FRANCIS HEISLER
CHARLES A. STEWART
P. O. Drawer 3996
Carmel, California

OLIVER ELLIS STONE
1500 Massachusetts
Ave., N.W.
Washington 5, D.C.

APPENDIX "A".

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17797

LINUS C. PAULING, ET AL., APPELLANTS

v.

ROBERT S. MCNAMARA, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided December 23, 1963

Mr. Francis Heisler, with whom *Mr. Oliver Ellis Stone* was on the brief, for appellants.

Mr. John C. Eldridge, Attorney, Department of Justice, for appellees. *Assistant Attorney General Douglas*, *Messrs. David C. Acheson*, United States Attorney, *Sherman L. Cohn* and *David J. McCarthy, Jr.*, Attorneys, Department of Justice, were on the brief for appellees. *Mr. Morton Hollander*, Attorney, Department of Justice, also entered an appearance for appellees.

Miss Marie S. Klooz filed a brief on behalf of Austrian Pacifist Union, et al., as *amici curiae*, urging reversal.

Before: BAZELON, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge*: This appeal presents, for the second time in less than three years, an effort to enlist judicial power to stop all nuclear testing, including underground tests.

The complaint[1] filed by appellants sought a declaratory judgment to restrain and enjoin the Secretary of Defense and the members of the Atomic Energy Commission from detonating any nuclear weapons that produce radiation or radioactive atomic nuclei or alternatively to issue such injunction effective only when, and if, a similar injunction is issued by the Supreme Court of the Union of Soviet Socialist Republics from which, it is alleged, similar relief is being sought.

The District Court granted appellees' motion to dismiss the complaint on the grounds that (1) plaintiffs had no standing to sue; (2) the complaint failed to state a justiciable controversy, (3) the actions and powers challenged were plainly authorized by law and the Constitution, and (4) the holding of the Court of Appeals, which affirmed the dismissal of a complaint in Civil Action No. 866-58, was res judicata.[2]

The District Court was plainly correct on all points.

In light of the historic limits on judicial power vis-à-vis the other coordinate branches of government and especially in light of our prior clear holding that a claim such as now asserted presents no justiciable controversy,[3] it

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[1] The complaint purports to assert a class action on behalf of 115 U.S. citizens and more than 100 aliens, including nationals of several neutral and friendly nations, and of Poland, Czechoslovakia and Hungary.

[2] Pauling v. McElroy, 107 U.S.App.D.C. 372, 374, 278 F.2d 252, 254, *cert. denied*, 364 U.S. 835 (1960).

[3] *Ibid.*

is difficult to escape an impression that the appellants, no matter what their motives, may be more interested in exploiting the judicial process as an implement of propaganda than in securing any judicial mandates that could conceivably be anticipated.

As recently as 1950 Mr. Justice Frankfurter restated in very broad terms the scope of federal judicial power:

> Limitation on "the judicial power of the United States" is expressed by the requirement that a litigant must have "standing to sue" or, more comprehensively, that a federal court may entertain a controversy only if it is "justiciable." Both characterizations mean that a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 150 (1950) (separate opinion).

In our 1960 holding we tried, perhaps too tersely because the point seemed so plain, to make clear that decisions in the large matters of basic national policy, as of foreign policy, present no judicially cognizable issues and hence the courts are not empowered to decide them. We paraphrase our earlier opinion in emphasizing that to temporize with these fundamental propositions by holding this case moot because the United States is presently committed to a suspension of atmospheric testing is to take some risk, however slight or remote, of seeming to invite further resort to the courts should testing be resumed. We are unwilling to suggest, even so indirectly, any erosion of the fundamental principle that the executive action challenged by the pleadings plainly falls in

that area where the Executive and Legislative Branches are supreme and final, reviewable only by the electorate, not by the courts. The language of the Court in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), is very much in point here:

> Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. [Citing *Coleman* v. *Miller*, 307 U.S. 433, 454 (1939); *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319-321 (1936); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918)].

That appellants now resort to the courts on some vague and disoriented theory that judicial power can supply some quick and pervasive remedy is no reason why we as judges should regard ourselves as some kind of Guardian Elders ordained to review the political judgments of elected representatives of the people. In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. But the basic and important corollary is that the people may remove their elected representatives as they cannot dismiss United States Judges. This elementary fact about the nature of our system, which seems to have escaped notice occasion-

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Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), cited by the dissent, is not in point; that case held only that the penal sanction of automatic forfeiture of United States citizenship could not be imposed without due process.

ally, must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make better decisions on such issues.

Affirmed.

BAZELON, *Chief Judge*, dissenting: This complaint was brought by 255 citizens of the United States and 26 other countries, including eight Nobel Laureates (one of whom has twice received the award). The plaintiffs charge that the defendants, together with their counterparts in the Soviet Union and the United Kingdom, have "caused the detonation of nuclear weapons in the air, on the ground, and under water," causing the plaintiffs "to be damaged genetically, somatically and psychologically." They seek to enjoin such activity in the future.

Since the institution of this suit, the United States and 107 other nations have signed the Nuclear Test Ban Treaty:

> Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances,
>
> • • •
>
> Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control . . .

in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas. . . .[1]

Accordingly, there is not such a likelihood that further injury will occur as to require decision of the delicate questions presented. I would therefore "reverse the judgment and remand the case to the District Court with directions to dismiss the complaint without prejudice." See my opinion concurring in part and dissenting in part in *Pauling* v. *McElroy*, 107 U.S.App.D.C. 372, 374, 278 F.2d 252, 254 (1960).

Though it disclaims doing so, the majority opinion seems to me to impugn the motives of appellants, which I think should not be done. Moreover the opinion attributes greater limitations to judicial power than the Constitution requires or the decision in this case makes necessary. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963), and cases there cited; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *The Flying Fish*, 2 Cranch 170 (1804).

---

[1] Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water, August 5, 1963, *U.S. Treaties and Other International Agreements*.

The complaint does not refer to underground testing. Although certain underground testing is not banned by the Treaty, the parties thereto specifically undertake to seek "a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground."

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,797 September Term, 1963

LINUS C. PAULING, ET AL., APPELLANTS

v.

ROBERT S. MCNAMARA, ET AL., APPELLEES

Civil 1986-62

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, *Chief Judge*, and BASTIAN and BURGER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Burger.

Dated December 23, 1963.

Separate dissenting opinion by Chief Judge Bazelon.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,797 September Term, 1963

LINUS C. PAULING, ET AL.,

APPELLANTS

v.

Civil 1986-62

ROBERT S. MCNAMARA, ET AL.,

APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, *Chief Judge*, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and MCCOWAN, *Circuit Judges*, in Chambers.

ORDER

On consideration of appellants' petition for rehearing *en banc*, it it

Ordered by the court *en banc* that appellants' petition is hereby denied.

Per Curiam

Dated: Jan 23, 1964

APPENDIX "C".

Statutory, Constitutional, Treaty and Code Provisions Involved.

a.) 1 USC 112. *Statutes at large; contents; admissibility in evidence.*

"The Administrator of General Services shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Administrator of General Services issued in compliance with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Administrator of General Services shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States. (July 30, 1947, ch. 388, 61, Stat. 636; Sept. 23, 1950, ch. 1001, Par. 1; 64 Stat. 979; Oct. 31, 1951, ch. 655, Par. 3, 65 Stat. 710.)"

1 USC 112a. *United States treaties and other international agreements; contents; admissibility in evidence.*

"The Secretary of State shall cause to be compiled, edited, indexed, and published, beginning as of January 1, 1950, a compilation entitled 'United States Treaties and Other International Agreements,' which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, during each calendar year. The said United States Treaties and Other International Agreements shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States. (Added Sept. 23, 1950, ch. 1001, Par. 2, 64 Stat. 980.)"

b.) 28 USC 1350, 62 Stat. 934. *Alien's action for tort.*

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. (June 25, 1948, ch. 646, 62 Stat. 934.)"

c.) 42 USC 2011 *et seq.* 68 Stat. 921 *et seq.* Section 91 of the *Atomic Energy Act* (42 USC 2121; 68 Stat. 936):

"(a) The Commission is authorized to—

"(1) conduct experiments and do research and development work in the military application of atomic energy; and

"(2) engage in the production of atomic weapons, or atomic weapon parts, except that such activities shall be carried on only to the extent that the express consent and direction of the

President of the United States has been obtained, which consent and direction shall be obtained at least once each year.

"(b) The President from time to time may direct the Commission (1) to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of national defense, or (2) to authorize the Department of Defense to manufacture, produce or acquire any atomic weapon or utilization facility for military purposes: *Provided, however,* That such authorization shall not extend to the production of special nuclear material other than that incidental to the operation of such utilization facilities. . . ."

d.) *Treaties of Friendship, Commerce and Consular Rights between the United States of America, and Austria*

47 Stat. 1876, 1899; TS 838, 839. See also 10 Stat. 1876, Articles VIII and IX.

"The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well as for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." (p. 1878)

Brazil

8 Stat. 390; TS 34

Article XII

"Both the contracting parties promise and engage formally to give their special protection to the person and property of the citizens and subjects of each other, of all occupations, who may be in their territories, subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial intercourse; on the same terms which are usual and

customary with the natives or citizens and subjects of the country in which they may be; for which they may comply in defense of their rights, such advocates, solicitors, notaries, agents, and factors, as they may judge proper in all their trials at law." (p. 392)

Columbia (New Granada)

9 Stat. 881, 18 Stat. (2) 550; TS 54

Article XIII

"Both contracting parties promise and engage formally to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of one or the other, transient or dwelling therein, having open and free to them the tribunals of justice for their judicial recourse, on the same terms which are usual and customary with the nations or citizens of the country; for which purpose, they may either appear in proper person, or employ in the prosecution or defense of their rights such advocates, solicitors, notaries, agents, and factors as they may judge proper in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions or sentences of the tribunals, in all cases which may concern them, and likewise at the taking of all examinations and evidence which may be exhibited in said trials." (pp. 886, 7)

Denmark

8 Stat. 340; TX 64. See also 12 UST 908; TS 65 (Art. V and protocol (1))

Article II

"The contracting parties . . . mutually agree that the citizens and subjects of each . . . shall enjoy all the rights, privileges, and exemptions in navigation and commerce, which native citizens or subjects do, or shall enjoy, submitting themselves to the laws, decrees, and usages, there established, to which native citizens or subjects are subjected. . . ." (p. 341)

Finland

49 Stat. 2659; TS 868, Articles I and XVI

Article I, Para. 4

"The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." (pp. 2660, 61)

Great Britain

8 Stat. 116; TS 105

Article II

"All settlers and traders, within the precincts or jurisdiction of the said parts, shall continue to enjoy, unmolested, all their property of every kind, and shall be protected therein. They shall be at free liberty to remain there, or to remove with all or any parts of their effects, and it shall be free to them to sell their lands, houses, or effects, or to return the property hereof, at their discretion. . . ." (p. 117)

Article III

"As this article is intended to render in a great degree the local advantages of each party common to both, and thereby to promote a disposition favorable to friendship and good neighborhood, it is agreed that the respective governments will mutually promote this amicable intercourse, by causing speedy and impartial justice done, and necessary protection to be extended to all who may be concerned therein." (p. 118)

Holland

8 Stat. 32; TS 249

Article VII

"It shall be lawful and free for the subjects of each party, to employ such advocates, attorneys, solicitors or factors as they shall judge proper." (p. 36)

Hungary

44 Stat. 2441; TS 748

Article I, sub-par. 3

"The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." (p. 2442)

Italy

62 (2) Stat. 2255; TIAS 1965

Article V, Par. 4

"The nations, corporations and associations of either High Contracting Party shall enjoy freedom of access to the courts of justice and to administrative tribunals and agencies in the territories of the other High Contracting Party in all degrees of jurisdiction established by law, both in pursuit and in defense of their rights; shall be at liberty to choose and employ lawyers and representatives in the prosecution and defense of their rights before such courts, tribunals and agencies. . . ." (pp. 2262, 4)

Norway

47 Stat. 2135; TS 852, Articles I and XII

Article I, Par. 3

"The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law." (pp. 21, 36)

Poland

48 Stat. 1507; TS 862

Article I

"The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of

the other on conforming to the local laws, as well for the prosecution as for the defense of their rights in all degrees of jurisdiction exhibited by law." (p. 1509)

Sweden

8 Stat. 60; TS 346

Article III

"The subjects of the King of Sweden shall enjoy all the rights, liberties, privileges, immunities and exemptions in Trade, Navigation and Commerce which the said nations do or shall enjoy, whether in passing from one port to another of the United States or in passing to or from the same, from or to any port of the world whatever." (p. 62)

Switzerland

11 Stat. 587; 18 Stat. (2) 748; TS 353, Article I

"The citizens of the United States of America and the citizens of Switzerland . . . shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens, either by themselves or by such advocates, attorneys, or other agents as they may think proper to select.

"No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject." (p. 599)

Yugoslavia (Serbia)

22 Stat. 963; TS 319, Article IV

Article IV

"Citizens of the United States of America in Serbia and Serbian subjects in the United States of America shall have reciprocally free access to the Courts of Justice on conforming to the laws of the country,

both for the prosecution and for the defense of their rights in all degrees of jurisdiction established by the laws." (p. 965)

e.) *Treaty and Protocol between the United States and Belgium*

Article 3

"(1) Nationals of either Contracting Party within the territories of the other Party shall be accorded full legal and judicial protection for their persons, rights, and interests. Such nationals shall be free from molestation and shall receive constant protection in no case less than that required by international law.

"(2) To this end they shall in particular have right of access, on the same basis and on the same conditions as nationals of such other Party, to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction and shall have right to the services of competent persons of their choice."

f.) *Charter of the United Nations*

59 Stat. 1031

Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

"a. higher standards of living, full employment, and conditions of economic and social progress and development;

"b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

"c. universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

Article 74

"Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters."

g.) Bill of Rights

Fifth Amendment to the Constitution of the United States of America

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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No. 966

In the Supreme Court of the United States

OCTOBER TERM, 1963

LOUIS O. FAUBUS, S. ADLER, GUNTHER ANDERS, ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE OF THE UNITED STATES, GLENN T. SEABORG, CHAIRMAN, JOHN S. GRAHAM, ET AL., MEMBERS OF THE ATOMIC ENERGY COMMISSION OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 965

LINUS C. PAULING, S. ADLER, GUNTHER ANDERS, ET AL., PETITIONERS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE OF THE UNITED STATES, GLENN T. SEABORG, CHAIRMAN, JOHN S. GRAHAM, ET AL., MEMBERS OF THE ATOMIC ENERGY COMMISSION OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This case originated with a suit filed in 1962 by petitioners, 255 residents of the United States and several foreign countries, to restrain the respondents from testing nuclear weapons on the theory that the Atomic Energy Act, 42 U.S.C. 2011, did not authorize such testing, or, if it did, was unconstitutional (J.A. 1–46).[1] Eleven of the petitioners had previously

[1] "J.A." references are to the printed Joint Appendix in the Court of Appeals, which is included as part of the record in this Court.

730-026—64

brought an unsuccessful action against the then Secretary of Defense and members of the Atomic Energy Commission to enjoin the testing of nuclear weapons. *Pauling* v. *McElroy*, 164 F. Supp. 390 (D.D.C.), affirmed, 278 F. 2d 252 (C.A.D.C.), certiorari denied, 364 U.S. 835.

The present action was dismissed by the district court on the grounds, *inter alia*, that the petitioners lacked standing to sue and that the testing of nuclear weapons was "authorized by law and * * * not prohibited by the Constitution." (J.A. 49). The Court of Appeals affirmed, holding that the district court "was plainly correct on all points." (Pet. App. 2a.) Chief Judge Bazelon, in a separate opinion, expressed the view that the case was moot in light of the recent Nuclear Test Ban Treaty (Pet. App. 5a–6a).

The decision below is clearly correct. To begin with, petitioners lack standing, for they have failed to allege any injury to themselves apart from an asserted injury to mankind generally. As this Court emphasized in *Massachusetts* v. *Mellon*, 262 U.S. 447, 488, a party must show some direct injury to himself over and above the fact "that he suffers in some indefinite way in common with people generally." See, also, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 132, holding that complainants challenging governmental action are without standing where they "show no more than a mere possible injury to the public." The instant case falls squarely within these precepts. The gravamen of the complaint is that the detonation of nuclear weapons creates "radiation

that damages the population of the world, among them the plaintiffs * * *". (J.A. 33).

Even if petitioners had standing to maintain this action, there can be no doubt that the testing of nuclear weapons is authorized by law. In the Atomic Energy Act of 1954, Congress declared it to be the policy of the United States that "the development, use, and control of atomic energy" shall be "subject at all times to the paramount objective of making the maximum contribution to the common defense and security * * *." 42 U.S.C. 2011. And Congress had found that "[t]he development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security." 42 U.S.C. 2012. In furtherance of this declared policy and its express finding, Congress explicitly authorized the Atomic Energy Commission to (42 U.S.C. 2121):

> (1) conduct experiments and do research and development work in the military application of atomic energy; and
>
> (2) engage in the production of atomic weapons, or atomic weapon parts, except that such activities shall be carried on only to the extent that the express consent and direction of the President of the United States has been obtained, which consent and direction shall be obtained at least once each year.
>
> (b) The President from time to time may direct the Commission (1) to deliver such quantities of special nuclear material or atomic weapons to the Department of Defense for such use as he deems necessary in the interest of

national defense; or (2) to authorize the Department of Defense to manufacture, produce, or acquire any atomic weapon or utilization facility for military purposes: *Provided, however*, That such authorization shall not extend to the production of special nuclear material other than that incidental to the operation of such utilization facilities.

The policies of the Act are also to be effectuated by "a program of conducting, assisting, and fostering research and development," which includes the extension of scientific or technical findings and theories into "practical application for experimental and demonstration purposes, including the experimental production *and testing of models, devices, equipment, materials, and processes.*" (Emphasis supplied.) 42 U.S.C. 2013(a), 2014(y).

The constitutional claim is patently insubstantial. Certainly, in the exercise of its specific power to "provide for the common Defence * * * of the United States," U.S. Const., Art. I, Section 8, the authority of Congress to authorize the testing of nuclear weapons is beyond doubt. *Cf., Hirabayashi v. United States*, 320 U.S. 81, 93; *Silesian-American Corp. v. Clark*, 332 U.S. 469, 476–477.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MAY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964